IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 62

JOHN H. CRUMADY,

Petitioner,

vs.

JOACHIM HENDRIK FISSER, her engines, tackle, apparel, etc., and JOACHIM HENDRIK FISSER, and/or HENDRIK FISSER,

Respondents,

vs.

NACIREMA OPERATING CO., INC.,

Impleaded Respondent.

BRIEF FOR IMPLEADED RESPONDENT IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI.

JOHN J. MONIGAN, JR.,
Counsel for Impleaded Respondent,
Nacirema Operating Co., Inc.,
744 Broad Street,

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No. 971

JOHN H. CRUMADY,

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Opinions of the Courts Below.

The opinion of the District Court for the District of New Jersey is reported in 142 Fed. Supp. 389, (L16a)[1]. The opinion of the Court of Appeals for the Third Circuit is reported in 249 Fed. 2d 818 (LP29). The opinion of the Court of Appeals on petition for rehearing is reported in 249 Fed. (2d) 821 (LP36).

[1] References are: L—libellant's appendix; LP—libellant's petition for certiorari; CP—cross-petition for certiorari; IRS—impleaded respondent's supplemental appendix.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 30, 1957, (LP35). The order denying rehearing was entered on December 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Question.

Is not indemnity unavailable in favor of a vessel against a stevedoring company in the absence of a contract between them when such indemnity is sought in respect of damages for injuries sustained by an employee of such stevedoring company?

Statement of the Case.

The facts which give rise to the present controversy have been set forth in the brief of the impleaded respondent in opposition to the petition for certiorari filed on behalf of John H. Crumady, petitioner, No. 968. It is necessary, however, in view of the statements in the cross-petition for certiorari (CP3) concerning the contract between the impleaded respondent and the Insular Navigation Company briefly to refer to that contract. Set forth in the appendix hereto is the complete colloquy of counsel in the trial court in connection with the proffer of that contract which was marked Exhibit R-14 for identification to which the trial court sustained the objection of the impleaded respondent. It appears from the contract that it was made by the impleaded respondent and the Insular Navigation Company, and contrary to the contention made in the cross-petition for certiorari (CP5), it was admitted by counsel for the respondent (*infra* page 15), that the contract was

made by Insular Navigation Company as agent for the charterer. It appears, also, from the same colloquy that the argument advanced in the cross-petition for certiorari that the vessel being an inanimate object could not make a contract on its own behalf (CP5) is clearly specious, since it appears as well from the contract, itself, that it was not made on behalf either of the vessel or the vessel's owner, and such was the holding of the trial court (*infra*, page 16).

In view of those circumstances, it was the contention of the impleaded respondent in the Court of Appeals that as a matter of law indemnity would not lie in favor of the vessel against it. The Court of Appeals determined that its decision respecting the libellant's allegations of the unseaworthiness of the vessel made it unnecessary to pass upon the substantial question thus raised (CP13).

It is the contention of the impleaded respondent that since the right to indemnity which is asserted in the cross-petition can not be predicated upon any contract between the parties, the immunity created in its favor by the Congress in the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §901 *et seq.* 44 Stat. 1424) precludes any obligation on its part in respect of injuries sustained by one of its employees. It likewise is its contention that the doctrine of active and passive negligence upon which indemnity must be predicated in the absence of a contractual undertaking is unavailable to the respondent, since the impleaded respondent owed no duty to the petitioner except that which was imposed upon it by reason of the Longshoremen's and Harbor Workers' Compensation Act. As a consequence, regardless of the merits of the controversy between the petitioner and the cross-petitioner respecting the unseaworthiness of the

vessel, the effect of the decision of the United States Court of Appeals relieving the impleaded respondent from liability in indemnity should be affirmed without further review by this court.

ARGUMENT.

Indemnity must be predicated upon a contract, express or implied, between the indemnitor and the indemnitee, and in the absence of an express agreement or a mutuality of obligation owed by them to a third person, there is no substantive right to such relief.

The situation presented by the instant case is one which has occurred frequently since the decision of this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), rehearing denied *id.* 878, which imposed upon a vessel for the benefit of longshoremen the same obligation which it owed to seamen since the decision of the United States Supreme Court in *The Osceola*, 189 U. S. 158 (1903). That obligation was to indemnify the seamen for loss resulting from the unseaworthiness of the vessel or its gear. While the correctness of *The Osceola* and *Sieracki* decisions may well be questioned, they nevertheless must be accepted, since they have been frequently cited with approval.

Because of the harshness of the rule which imposes upon a vessel a financial obligation resulting from its unseaworthiness where such condition resulted not from its own fault but from the improper acts of others, cases in which vessels have sought to avoid their responsibility have been frequently before the courts.

At one time by reason of the so-called "control test", a vessel was able to escape liability to a person injured if its unseaworthiness resulted from the fault of persons other than the vessel or its crew, particularly when the damage resulted from the improper use of equipment which was not under its control, *The Hindustan*, 37 Fed. (2d) 932,

aff'd. memo 44 Fed. (2d) 1015 (CCA 2d. 1930); *Long* v. *Silver Line,* 48 Fed. (2d) 15 (CCA 2d 1931). That doctrine, however, was determined to be erroneous in *Petterson* v. *Alaska S. S. Co.,* 205 Fed. (2d) 478 (9th Cir. 1953), aff'd. memo 347 U. S. 396 (1954), and no longer can be used to exculpate the ship, *Feinman* v. *A. H. Bull S. S. Co.,* 216 Fed. (2d) 393, (3d Cir. 1954).

To accomplish a similar result, the admiralty doctrine of contribution in collision cases was used to limit the pecuniary responsibility of the vessel, but that device was held to be inapplicable to non-collision cases; and hence, contribution was not permitted where both the vessel and others were guilty of negligence, *Halcyon Lines* v. *Haenn Ship. etc. Corp.,* 342 U. S. 282 (1952). As a consequence, to relieve the ship owner of the obligation to respond in damages to an injured person in such circumstances, the doctrine of indemnity was explored.

That doctrine, in the absence of an express contract, had its origin in what was said to be a common-law principle stemming from implied contracts. In circumstances where two persons were under a legal obligation to a third person, the one who was held liable to the injured person without actual culpability but because of a breach of a non-delegable legally imposed duty was held to be entitled to indemnity from one whose conduct caused the injury. Typical of such cases is the situation in which a statutory obligation is imposed upon a municipality in the maintenance of highways. When such municipality is liable in damages to a person injured in consequence of the defective condition of such highway, which condition was caused by the negligence of a person hired by the municipality to perform work thereon, a municipality, nevertheless, is permitted to recover from such negligent person that which it has been obliged to pay to him who was hurt. Such was the

decision in the early case of the *Inhabitants of Lowell* v. *The Boston and Lowell R. R. Corp.*, 23 Pick. (Mass.) 24, (1839).

The principle thus established was considered an exception to the general rule that there could be no contribution between participants in a criminal action or between joint tort feasors. To permit recovery, the existence of liability to the person injured and the imposition of damages upon one who was guilty of no active misfeasance but whose obligation to the injured party was imposed by operation of law without moral fault were required, *Westfield* v. *Mayo*, 122 Mass. 100 (1877). However, if the party who sought indemnity was guilty of a breach of duty in its own right to the injured person, implied indemnity is not permitted; and the general rule which precludes contribution between joint tort feasors is applicable, *Union Stockyards Co.* v. *Chicago etc. R. R. Co.*, 196 U. S. 217 (1905). Cf. *Washington Gas Co.* v. *District of Columbia*, 161 U. S. 316 (1896).

Because of the divergent theories upon which a ship owner was permitted to escape financial liability to a person who was injured aboard a vessel and the conflicts engendered when indemnity was sought from a stevedore employer to whom the Congress granted immunity from responsibility in negligence to its employees in exchange for the mandatory responsibility to respond in compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901 *et seq.* 44 Stat. 1424, it is difficult to reconcile many of the reported cases. Since the decision in *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124 (1956), however, it must be regarded as settled that the immunity granted to an employer against responsibility other than in the framework of the Longshoremen's and Harbor Workers' Compensation Act for injuries sus-

tained by its employees is not available to prevent a vessel's claim for indemnity when such employer has contractually obligated itself to indemnify or has contracted to perform work, if such injuries resulted by reason of the improper performance of the work which the employer contracted with the vessel to perform.

In the *Ryan* case, the majority of the Court (with four Justices dissenting) were of the opinion that indemnity would be permitted, although no express contract to indemnify existed, so long as the injuries resulted from the failure to perform the work contracted for in a reasonably proper manner. It likened the situation thus presented to that which existed in breach of implied warranties in the sale of goods and consequently permitted a vessel, which was held to be unseaworthy and hence liable to an employee of the stevedoring firm for personal injuries which he sustained, to recover the total amount of such damages from the stevedoring corporation, which, in violation of its contract, improperly loaded cargo aboard the craft which resulted in the injuries complained of.

In the absence of a contractual undertaking, it appears manifest that there can be no indemnity awarded against an employer in consequence of injuries sustained by its employee when such employee is covered by the Longshoremen's and Harbor Workers' Compensation Act, for unless circumstances exist which afford a basis for the application of the common-law doctrine of indemnity exemplified by the foregoing decision of the *Inhabitants of Lowell* v. *Boston and Lowell R. R. Corp., supra,* there is no substantive right of action therefor. This principle was recognized in the cases of *Slattery* v. *Marra,* 186 Fed. (2d) 134, (2d Cir. 1951), certiorari den'd. 341 U. S. 915, (1951); and *Brown* v. *American-Hawaiian S. S. Co. et al.,* 211 Fed. (2d) 16, 18, (3d Cir. 1954). To like effect see: *Lo Bue* v. *U. S.,* 188 Fed. (2d) 800,

(2d Cir. 1951); *American Mutual* v. *Matthews,* 182 Fed. (2d) 322 (2d Cir. 1950); *Read* v. *United States,* 201 Fed. (2d) 758 (3d Cir. 1953); *Crawford* v. *Pope & Talbot, Inc.,* 206 Fed. (2d) 784 (3d Cir. 1953); *Bordal* v. *Atlantic Maritime Co., Inc. et als.,* 127 F. Supp. 186 (E. D. Pa. 1954). See also: *103 U. of Pa. L. Rev. 321 (1954); 70 Harv. L. Rev. 149 (1956).*

The doctrine that a contractual or other special relationship between the parties was not essential to indemnity, represented by the decisions of *U. S.* v. *Rothschild International Stevedoring Co.,* 183 Fed. (2d) 181 (9th Cir. 1950) and *States S. S. Co.* v. *Rothschild International Stevedoring Co.,* 205 Fed. (2d) 253 (9th Cir. 1953), which was at one time apparently accepted in the Ninth Circuit before the decision in *Ryan Co.* v. *Pan-Atlantic Corp., supra,* appears to have been repudiated by the decision in that Court of *American President Lines* v. *Marine Terminals Corp.,* 234 Fed. (2) 753 (9th Cir. 1956), cert. den'd. 352 U. S. 926, (1956); and the concurring opinion in *States S.S. Co.* v. *Rothschild International etc., supra,* which recognized the necessity for a contractual or special relationship upon which the indemnity can be grounded, is now accepted in that circuit.

The applicable principles were well stated in *Crawford* v. *Pope & Talbot, Inc., supra,* where it was said at page 792 [of 206 Fed. (2d)]

> "• • • Section 5, [33 U. S. C. A. §905], however, does not insulate the employer from all liability to a third party from whom an employee has recovered damages. See United States *v.* Arrow Stevedoring Co., 9 Cir., 1949, 175 F. 2d 329, 332. Liability for indemnity as distinguished from contribution, may arise from the contractual relations of the employer with the third party. Claims for full indemnity

arising out of such contractual relations have *not* been considered barred by the section. See Rich *v.* United States, 2 Cir., 1949, 177 F. 2d 688. The right to indemnity can, of course, arise by virtue of an express contract or such a right may be raised from the circumstances surrounding the contractual relationship between the employer and the third party. In either case the indemnitee has a claim which is independent of and does not derive from the injury to the employee, except in a remote sense not within the provisions of Section 5. * * * " (Brackets ours.)

To like effect is the opinion in *Brown* v. *American-Hawaiian SS. Co., supra,* at page 18 [of 211 Fed. (2d)]

"* * * There is, however, one aspect of the present appeal which requires further refinement. Appellant suggests that irrespective of the contractual relations between third-party plaintiff (owner) and third-party defendant (employer) in this type of suit, a right of indemnity exists where the liability of the former is secondary or passive while that of the latter is primary or active. Such a problem would be posed, for example, where the owner is held liable to a plaintiff-employee for a condition of unseaworthiness created by the employer's negligence and there is no contract, express or implied, between them, or, if such contract exists, it cannot be read to lay the groundwork for an indemnification claim. In answer to this suggestion we repeat what we thought had been made clear by the *Crawford* case: there can be no action of indemnity in these cases which is not based on the violation of some contractual duty. Were the rule otherwise the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act. Such a rule would be violative of Section 5 of the Act as well as of the spirit of the entire statute

whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. Cf. Pope & Talbot, Inc. *v.* Hawn, 346 U. S. 406, 412, 74 S. Ct. 202. * * *"

Those decisions were cited with approval in *Hagans* v. *Farrell Lines*, 237 Fed. (2d) 477 (3d Cir. 1956).

Since there is no contractual relationship between the respondent and the impleaded-respondent in the instant case and both are not jointly obligated to the petitioner since the impleaded-respondent is liable to the petitioner only for Longshoremen's and Harbor Workers' compensation benefits, the requisite conditions for indemnity are absent. In such circumstances, it is impossible to attempt to evaluate active and passive negligence (as did the trial court, L34a), since the impleaded respondent owes no duty to the petitioner other than to pay him the prescribed longshoremen's benefits. That there can be no negligence unless there is a breach of duty is fundamental.

In the circumstances, then, there is no foundation, either factual or legal, for the allowance of indemnity to the vessel in the present case. The vessel and the impleaded respondent were not similarly obligated to the petitioner, and hence, the basis for common-law liability is not present. Without a contract between the parties, to permit indemnity deprives the impleaded respondent of the immunity given to it by Section 5 of the Longshoremen's and Harbor Workers' Compensation Act.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN J. MONIGAN, JR.,
Counsel for Impleaded Respondent,
Nacirema Operating Co., Inc.

APPENDIX TO IMPLEADED RESPONDENT'S BRIEF.

(IRS 18a *et seq.*)

Colloquy.

(829) Mr. Cichanowicz: I am only offering this, and the contract speaks for itself. Whether it is between the shipowner or the charterer, I think the contract indicates that.

Mr. Monigan: My objection is directed to the competency of the proffered paper.

The Court: You have no objection to its authenticity?

Mr. Monigan: No, your Honor.

The Court: I would be ruling in a vacuum unless I knew what the document contained. If you want to show it to me I will endeavor to make a ruling upon the present objection which goes to its competency.

Mr. Monigan: Quite so, your Honor, it appears on the first page of the agreement which I think perhaps should be designated by an identification number so the record will reveal the matter which we are talking about.

It is between Insular Navigation Company and Nacirema Operating Company, it being a contract in writing and it cannot possibly bind anyone other than those who are parties thereto; that so far as the respondent-impleaded is concerned, the agreement is not made with any parties to the present action and (830) therefore it is not competent to bind Nacirema in respect of the action between the Crumady, libelant, and the vessel, respondent.

The Court: There is no question, is there, Mr. Monigan, but that Nacirema Operating Company, Inc., is a party to this document?

Mr. Monigan: No question, your Honor.

The Court: And the other party seems to be Insular Navigation Company in its capacity as owner, operator, charterer or agent.

Mr. Monigan: That is so. The reason that the matter becomes of concern at this stage of the proceedings, is that I assume counsel for the vessel is offering this document in

order to avail themselves of the doctrine of those cases which concern themselves with an alleged breach of a stevedoring contract between a vessel and a stevedore.

This contract which has been proffered by counsel for the vessel manifestly is not a contract between the vessel and the stevedoring company. There has been some authority in the very few cases in which this matter has come before the court, as your Honor knows, it is one of relatively recent origin under the *Ryan Stevedore* case in which there being no indemnity, that is no written indemnity for a loss such as the (831) libelant sustained in the present matter, the only relevancy or competency of the matter is because of an alleged breach of a contract to stevedore.

Now, there was in the *Ryan* case, of course, a direct contract between the vessel and the stevedore and it was upon the implied warranty akin to that which was under the Sales Act in which the court in the *Ryan* case permitted an action by the vessel over the cause of a breach of a warranty.

Now, the situation in respect to the analogy of breach of warranty which was applied by the Court in the *Ryan* case would preclude the vessel, which is not a party to this contract, from asserting any breach of warranty because of the absence of privity of contract.

In the writing itself there is no suggestion that the contract was made for the benefit of the vessel and indeed the only case which I have been able to discover in which a contract such as this which is proffered by counsel was offered in evidence was an attempt to justify on the third party beneficiary theory and that was denied by the court. It was in the District of California.

We also have one in our own district which is not a stevedoring contract but it suggests the general rule which is applicable to such contracts, that in (831) order that there be a cause of action possible under the contract there must be a clearly intended purpose on the part of both contracting parties to create a benefit in another person.

Now, the case to which I have reference in the Southern District of California, is 72 Fed. Supp. 574, at 588. There was a contract between the—well, let us put it this way: The United States contracted with a shipyard to build a vessel. The vessel was built. It was under lend-lease to the Ministry of Transport of the United Kingdom. The United States made a contract with the stevedoring company to load the vessel which was to go to the Far East. A longshoreman was injured aboard the vessel and this matter of liability of the stevedores' employer was brought before the court. It was a complicated case because of the sovereign immunity and diplomatic immunity and so on, but so far as here pertinent the court's opinion on page 588 of 72 Fed. Supp. says that that contract between the United States and the stevedoring company was not a contract for the benefit of the third party, so that it would inure to the benefit of the Ministry of Transport of the United Kingdom.

I believe that the analogy to the present matter is quite evident.

(833) The second case to which I had reference was the Isbrandtsen Line against Local 1291. That is the Court of Appeals in the Third Circuit, 204 Fed. (2d) 495. That was not a stevedoring contract in the same sense that we are discussing it here, it was a cause of action which was sought to be alleged by the vessel because of delay in the loading of the vessel.

The Court: Was there demurrage involved?

Mr. Monigan: I believe so, and the charterer of the vessel had made the contract with the stevedores and the Court of Appeals said that that contract was not one for the benefit of the vessel, and hence, whatever undertakings the stevedore made—stevedores made with the charterer were not such as to benefit the vessel.

For those reasons I believe that the proffer of the paper writing bearing date December 30, 1953, between Insular Navigation and Nacirema Operating Company is not admis-

sible in the present matter since Insular Navigation is not a party to the action, the only basis for the liability asserted against the respondent-impleaded must be that which the vessel itself asserts or its owner, and neither is a party to the contract proffered.

(834) The Court: What have you to say to the objection of counsel on the grounds stated therefor, Mr. Cichanowicz?

Mr. Cichanowicz: I have very little to say, that the offer is being made on the theory that the shipowner was a third part beneficiary of this contract. There was no contention being made that the contract was made directly with the vessel, and I believe that it is evident from the wording of the contract that there was—or that the shipowner was a third party beneficiary. I believe that differs from the situation of the cases mentioned by counsel.

The Court: Let me interrupt you there. The only indication of a possible interest of a concern other than Insular Navigation Company and the vessel is to be found in the characterization of Insular Navigation Company as owner, operator, charterer or agent. *Assuming that the last of those words, agent is the one to be relied on, does it indicate —does the document indicate anywhere for whom Insular Navigation Company was acting as agent in entering into the contract.*

Mr. Cichanowicz: No, it does not. We will go one step further and say that in fact, I believe that Captain Jacobson testified that they made it as agent (835) *for the charterer. I mean, I will make that statement on the record.* (Italics supplied.)

The Court: Entirely apart from that what is the purpose of your offer? What do you want to show by this document?

Mr. Cichanowicz: Primarily to show what the obligation of the stevedore was under the contract, and also to show the fact that this loading was done according to the footage instead of by hours and things of that nature.

Colloquy.

The Court: There is no question in this case that the libelant was an employee of Nacirema?

Mr. Cichanowicz: No.

The Court: There is no question in this case that Nacirema Stevedoring contractor was employed by someone to unload the vessel?

Mr. Cichanowicz: No, there is no question.

The Court: I do not see from a cursory examination of the document anything within it which would appear to be relevant, entirely apart from the basis of the pending objection, there is no undertaking, as I read it, on the part of Nacirema to handle cargo in any particular manner except to furnish slings and certain equipment, the major equipment to be used is expressly provided to be furnished by the (837) vessel, and although there are four characterizations of the party of the first part any one of which might be selected, *there is nothing within the four corners of the document to indicate that the Insular Navigation Company was acting either for the vessel or for the vessel's owner,* since I understand that the owner of the vessel is Joachim Hendrik Fisser, is that correct? (Italics supplied.)

Mr. Monigan: Corporation, yes.

The Court: I will sustain the objection to the offer. The offer may be marked for identification so that it may be referred to in any subsequent proceeding as the subject of this ruling.

(Contract marked Exhibit R-42 for identification.)

The Court: I might say that if counsel for the vessel can show by additional evidence, and cite controlling authority, the offer may be renewed. But as in the present posture of the proof, I can see no relevancy or competency in the proffered document, and hence my present ruling.

* * * * * *